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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the matter of )

TOLL FREE SERVICE ACCESS CODES )

CC Docket No. 95-155

To: The Commission

**COMMENTS ON PETITIONS FOR RECONSIDERATION**

ICB, Inc. ("ICB"), on behalf of itself and its clients, pursuant to Section 1.429(f) of the Commission's Rules and Regulations, 47 C.F.R. § 1.429(f), hereby offers its comments on the petitions for reconsideration<sup>1</sup> of the *Fourth Report and Order* in the captioned proceeding (FCC 98-48; released March 31, 1998), 63 Fed. Reg. 16440 (April 3, 1998). In this pleading ICB limits its comments to two points: (a) the Commission's erroneous assertion that the first come, first serve policy is an equitable mechanism for the provisioning of toll free numbers, and (b) the Commission's failure to recognize the substantial and destructive effect of its policy on the toll free "branding" industry.

**A. FIRST COME, FIRST SERVE**

Each of the petitioners criticizes the Commission's "first come, first serve" policy with respect to the 877 and future toll free codes. MCI at 2-9 (calling the first come, first serve approach "ill-conceived"); DMA at 9 (noting that the Commission's policy is neither fair nor truly first come, first serve); TFUC at 4-6 (refuting the Commission's erroneous assertion that the first come, first serve approach is more equitable and administratively manageable than a right of first

<sup>1</sup> Petitions for reconsideration were filed by The Direct Marketing Association ("DMA"), MCI Telecommunications Corporation ("MCI"), the Toll Free Users' Coalition ("TFUC"), and the Office of Advocacy of the United States Small Business Administration ("SBA"). Public Notice of the petitions (Report No. 2277) was issued on May 13, 1998, and was later published in the Federal Register. 63 Fed. Reg. 27575 (on May 19, 1998). On June 3, 1998, ICB requested a two day extension of time until today in which to submit this responsive pleading.

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refusal); and SBA at 4-9 (noting that the Commission has not provided a legally sufficient explanation for its first come, first serve policy).

ICB agrees with the petitioners that the Commission's decision to adopt a first come, first serve approach for the assignment of toll free numbers from the 877 and future toll free codes is contrary to the public interest. Moreover, the Commission's approach in this regard is either grossly mistaken or intentionally dishonest, because the procedure adopted in the *Fourth Report and Order* most decidedly does **not** provide for true first-come, first serve access to toll free numbers.

In the *Fourth Report and Order* the Commission touted its first-come, first-served policy as "fair" and promised that "[a]ll subscribers would be given an equal opportunity to reserve desirable toll free numbers as new codes are opened." *Fourth Report and Order* at ¶ 25. When the 877 toll free code opened on Sunday, April 5, 1998, nothing even remotely resembling first-come, first-served access was achieved. The administrative system itself is not conducive to first-come, first-served. No procedures whatsoever were adopted to ensure that RespOrgs deal fairly and nondiscriminatorily with their subscribers in the assignment of toll free numbers. The Commission refused to address the inherent and obvious conflict of interest that arises when a single entity acts simultaneously in multiple roles as RespOrg, carrier, and consumer of toll free numbers. For the Commission to tout first come, first serve as fair and equitable while ignoring obvious circumstances that utterly destroy any possibility of true first come, first serve treatment is intellectually dishonest and legally deficient.

Thus, in addition to the policy and practical problems that the petitioners have noted, ICB also urges the Commission to revisit the matter and consider the severe legal deficiencies. Section 251(e)(1) of the Communications Act provided, in pertinent part, that "The Commission shall create or designate one or more impartial entities to administer telecommunications numbering

and to make such numbers available on an equitable basis." 47 U.S.C. § 251(e)(1). As demonstrated above and in the attachments, the allocation of toll free numbers from the 877 code is neither impartial nor equitable. The scheme also runs afoul of Section 202(a) of the Communications Act which makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination ... in connection with like communication service ... or to make or give any undue or unreasonable preference or advantage to any particular ... class of persons, ... or to subject any particular ... class of persons ... to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

The Commission's toll free numbering system is also competitively unfair. The significance and anticompetitive effect of the conflict of interest of large RespOrgs/carriers can not be overemphasized. Consider the various hats worn by an AT&T, Sprint, or MCI in connection with the allocation and administration of toll free numbers. Each is:

- a SNAC member,<sup>2</sup> having a substantial role in structuring the toll free number administration system and procedures and advising the Commission;
- a telecommunications carrier, expected to meet the communications needs of *all* subscribers on a nondiscriminatory basis;
- a RespOrg, with unique access to an "essential resource" (*i.e.*, toll free numbers) needed by its subscribers;
- a user of numbers, placing it in direct competition with its subscribers for this essential resource;
- often a competitor with its subscribers' business ventures (*e.g.*, call centers, credit cards, etc.); and

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<sup>2</sup> SNAC, or the SMS Number Administration Committee, is an industry group responsible for implementing the operational aspects of the FCC's toll free number policies. The dominant members of SNAC are the large long distance carriers.

- a judge and jury on alleged number abuse, having been charged by the Commission with enforcing anti-hoarding regulations.<sup>3</sup>

It is impossible for an entity to equitably play these competing roles on a truly unbiased and nondiscriminatory basis. Even in the absence of anticompetitive or discriminatory intent on the part of the large RespOrg carrier, the system itself inevitably dictates that the small business user will not get a fair shake. This is not an equitable system, this is not a pro-competitive system, this is not a system conducive to small business, and this may not even be a legal system.

Since adoption of the *Fourth Report and Order*, however, the Commission has attempted to avoid the implications of its ill-advised policy contending that the first-come, first-serve policy does not extend to the treatment of end users by RespOrgs, but merely to the treatment of RespOrgs by Database Services Management, Inc. ("DSMI"). See *Opposition of the Federal Communications Commission to ResponseTrak Call Centers' Emergency Motion for Stay Pending Review* submitted on April 13, 1998, in *ResponseTrak Call Centers v. FCC* (D.C. Cir., Case No. 98-1195). This fantastic and absurd argument is both legally incorrect and factually inconsistent with the Commission's own statements in the *Fourth Report and Order*.

As a matter of law, the provisioning of toll free numbers from the SMS database is a common carrier service subject to Title II of the Communications Act. *Provision of Access for 800 Service, Order* (FCC 93-84) in CC Docket No. 86-10, 8 FCC Rcd 1423 at ¶¶ 25-31 (1993); *Beehive Telephone, Inc. v. The Bell Operating Companies*, 10 FCC Rcd 10562 at ¶¶ 15-22 (1995). The antidiscrimination provisions of Title II apply to the allocation and provisioning of

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<sup>3</sup> In the Second Report and Order in CC Docket No. 95-155, 12 FCC Rcd 11162, the Commission adopted regulations prohibiting the brokering and hoarding of toll free numbers, and mandated "If a subscriber hoards numbers [the FCC definition of hoarding includes brokering], that subscriber's service provider must terminate toll free service because hoarding is contrary to the public interest." *Second Report and Order* at ¶ 42. But the Commission imposed no due process requirements on the carriers in implementing this directive.

telephone numbers. *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, 10 FCC Rcd 4596 (1995). The Commission's belated attempt to limit these precedents to the DMSI/RespOrg relationship can not escape the inevitable conclusion that they apply equally to the RespOrg/end-user relationship.

The entire rationale for holding the provisioning of numbers by DMSI to be a common carrier function is that "SMS access is incidental to the provision of 800 access services." 8 FCC Rcd at ¶ 27. The same is true, however, of the RespOrg/Carrier's provisioning of the toll free number obtained from the database to its customer. The Commission simply can not claim, on the one hand, that carriers "administer [the] distribution [of toll free numbers] for the efficient operation of the public switched telephone network." *Second Report and Order in CC Docket No. 95-155*, 12 FCC Rcd 11162 at ¶ 30 (1997), while denying, on the other hand, that the requisition for and assignment of numbers to end users is incidental to the provision of toll free long distance service, a common carrier function. Indeed, the Commission's pre-Telecommunications Act of 1996 assumption of jurisdiction over the interstate aspects of telephone numbering (not limited to toll free) matters was premised on the view that the provisioning of numbers is part and parcel of the underlying common carrier telecommunications service, if not a common carrier function in its own right. *E.g.*, *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, 10 FCC Rcd 4596 at ¶¶ 17-20. The Commission there expressly found that the common carrier obligations of Title II of the Communications Act, including the prohibition on discrimination in Section 202(a), applies to the administration of telephone numbers. *Id.* at ¶ 20 & n.34.

As a factual matter, moreover, the Commission's belated attempt to deny that its promise of first come, first serve treatment to end users flies in the face of the plain language of the *Fourth Report and Order* itself. The Commission now conveniently pretends that the fate of subscribers

is irrelevant, but the actual language of the *Fourth Report and Order* says otherwise. The Commission championed its first-come, first-served policy as a "fair" resolution of the vanity number issue precisely because of its effect on *subscribers*. The Commission stated:

A first-come, first-served assignment method, as applied to vanity numbers in general, best serves our goal to assign toll free numbers fairly because *it does not discriminate against new subscribers. All subscribers would be given an equal opportunity to reserve desirable toll free numbers* as new codes are opened.

*Fourth Report and Order* at ¶ 25 (emphasis added). Further, in the Final Regulatory Flexibility Analysis, the Commission opined:

[R]eleasing vanity numbers in the 877 code and codes beyond 877 as each code is deployed to be made available on a first-come, first-served basis, is consistent with our obligation under section 251(e) of the Act to ensure that numbers are made available on an equitable basis. *This conclusion is in the public interest, and will not have an adverse impact on toll free subscribers, including small business entities, because it will open the toll free market to all toll free subscribers on an equal basis.*

*Fourth Report and Order*, Appendix B at ¶ 30 (emphasis added). It is disingenuous for the Commission now to argue that unfairness to subscribers is irrelevant.

Amazingly, even the RespOrg's themselves did not experience the first come, first serve treatment promised by the Commission. The opening of the 877 code on Sunday, April 5, 1998, was accompanied by technical problems that destroyed any pretense of fair and equitable first-come, first-served status. Attachment No. 1 is a news item reported in ICB Toll Free News entitled "1-877-DISARRAY."<sup>4</sup> It recounts the reports by several RespOrgs that experienced severe technical problems that locked many out of the SMS database system during those critical early hours. In addition, several participants have reported specific details to the Common Carrier Bureau staff. ICB and others advised the Commission in advance of these technical inadequacies, but the warnings were ignored in an unnecessary mad rush to open the 877 toll free code on April 5, 1998.

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<sup>4</sup> See, also, the discussion in the MCI petition for reconsideration.

The Commission must be intellectually honest and recognize that the system in place does not deliver the promised first come, first serve treatment. More important, the Commission must adopt **fair and equitable treatment to the end user of toll free numbers** as the primary goal in its toll free number administration policies.

**B. TOLL FREE BRANDING**

The petitioners urge the Commission in one way or another to replace the first come, first service policy with a right of first refusal such as that used for the 888 numbers that had been placed in set-aside. DMA at 4-10; TFUC at 4-6; and MCI at 7-8. ICB agrees that under the current regulatory structure—a system in which public commercial and non-public private uses are co-mingled and in which the Commission disallows private commercial exchanges of toll free numbers between consenting users—an across-the-board right of first refusal is necessary to protect existing holders of 800 and 888 numbers from encroachment and dilution of their business investment when new toll free codes are opened. But merely adopting a right of first refusal approach would be to focus on the trees to the exclusion of the forest. Protecting the value of and investment in a vanity number is, to be sure, a valid consideration for individual holders of those numbers, and one to which the Commission should be sensitive. But the far more serious problem with the Commission's toll free policy is that it threatens at best to substantially dilute and at worst to utterly destroy the entire phenomenon of what has come to be known as toll free branding.

"Toll free branding" may be a term of art, but it is used here in a broad sense to capture the wide gamut of public commercial use of toll free numbers in the 800 code to market products, to provide access for customers, and in many cases even to identify the firm, product, or service. Such vanity toll free numbers have taken on a unique characteristic all their own. There is a two-fold synergy at work. First, there is public recognition of the 800 code not merely as a toll free, non-geographic "area code," but also as a commercial segment of the telephone numbering

spectrum. Second, is the investment made to associate specific numbers with specific firms, goods, or services. This phenomenon has great value to the subscribers and it also benefits consuming public.

The problem facing existing holders of vanity toll free numbers, namely, the threat to the value of the 800 number, public confusion, misdials, etc., if replicas are used by third parties in 888, 877, and future toll free codes is obvious. But there is an additional, more subtle problem, but one which has a potentially greater adverse effect on the public interest. Toll free branding and other more traditional applications of toll free numbers generally exhibit a many-to-one communications characteristic, i.e., the number is widely and largely indiscriminately published so that large numbers of callers may contact a single firm. In recent years, there has been an explosion of use of toll free numbers that do not conform to this model. Toll free numbers are now being assigned to pagers, voice mail systems, cell phones, residential numbers, etc. In most cases these numbers are not advertised to the public at large, but rather are circulated to a limited group of potential callers. In one-to-one or few-to-one applications toll free numbers are used to exploit other characteristics, e.g., the toll free billing, non-geographic routing, and portability. Public recognition of such numbers is of little, if any, value.

The value of toll free numbers used in a public commercial context, whether or not it is a so-called "vanity" number and whether or not the particular number is replicated by a third party, is diminished by the co-mingling of private and public uses. As one petitioner noted, until new toll free codes were opened, "'800' was synonymous with 'toll free'." TFUC at 3. Not only that, the 800 number was melded in the public mind with commercial (and philanthropic) public communications. An 800 number was assumed to be a public means for communications access to an organization or firm. And as toll free branding became more common, many 800 numbers became associated with the products and services or even the firms themselves. For example, 1-



800-FLOWERS is not merely a phone number, it is the name and public identity of a company. But even a firm which merely had an "800" number consisting of any random seven digits, was viewed as part of the public toll free commercial community.

This public perception of 800 numbers will quickly erode as new toll free codes are opened and as both public and the newer private uses of toll free numbers are co-mingled. Advocates of a domain approach, including ICB, have urged the Commission to separate many-to-one public applications and one/few-to-one private applications into separate toll free codes. ResponseTrak Call Centers, for example, has urged the Commission to reserve the 800 and 888 codes for toll free brand applications (or what ResponseTrak calls "enterprise" numbers), while restricting the 877 and future codes for the private one-to-one or few-to-one applications in which the numbers will not be widely publicized at all, much less advertised as a vanity number.<sup>5</sup> All available evidence indicates that if such measures were adopted, the 800 and 888 codes would be adequate for many-to-one applications for the foreseeable future. By precluding public many-to-one applications beyond the 800 and 888 codes, there is no need to protect existing 800 and 888 numbers from replication in the 877 future toll free codes, making this a more efficient approach in terms of number allocation.

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<sup>5</sup> The Commission rejected these proposals without consideration on the erroneous theory that they were "partitioning," a concept already rejected in the *Second Report and Order* and were unrelated to the vanity number issue at hand. *Fourth Report and Order* at ¶40 n.78. As demonstrated above, however, a simple domain approach is directly relevant to the vanity number problem and, properly fashioned, can even eliminate the problem. Moreover, the domain concepts suggested by ICB, ResponseTrak, and others is markedly different from the partitioning approaches previously considered and rejected by the Commission. In the *Second Report and Order* the Commission had under consideration complex partitioning schemes that would have involved different toll free codes for a variety of different applications and would have required the immediate opening of multiple toll free codes. *Second Report and Order* at 67. The suggested domain models involve only two broad partitions and do not require the immediate opening of any toll free codes beyond that already scheduled.

In its petition for reconsideration, MCI asserts that if the Commission adopts a right of first refusal system, the existing supply of toll free numbers will last another 18 years. ICB respectfully suggests that under a domain approach in which the 800 (and possibly 888) code is reserved for public, many-to-one applications, the supply would last even longer. What the Commission fails to see is that its own refusal to adopt a domain approach is the single primary factor most responsible for number depletion. For many months prior to the opening of the 877 code, the weekly depletion of toll free numbers averaged less than 50,000 per week. There were still adequate numbers left for at least eight to ten weeks more, if not longer. Yet, a vastly huge quantity of 877 toll free numbers, reportedly as many as 338,000 numbers, were reserved immediately after the opening of the 877 code. On information and belief, the weekly drain has since returned to pre 877 levels. This means only one thing. A large quantity of 877 numbers were reserved on April 5, 1998, not because there was a need for additional numbers, but merely because attempts were being made to replicate existing 800 and 888 numbers. Under a domain approach, in which the 877 numbers would not be available for public commercial applications, the total demand for numbers in the week of April 5 would have been less than 50,000, and a large quantity of additional 877 numbers which have since been reserved would still be available today. Thus, the Commission's own policy has run counter to its legislative mandate to "efficiently" allocate numbers. A domain approach would have avoided this.

But the most significant benefit of a domain approach is not the most obvious: It preserves a segment of the telephone numbering spectrum as the home of public commercial applications. In other words, it would preserve the phenomenon of toll free branding. The Commission seems to have a rudimentary, even if imperfect, understanding of the value of vanity numbers to their subscribers. ICB urges the Commission to acknowledge and come to understand in addition the value to both subscribers and consumers of the general concept of toll free branding. Protecting

individual holders of specific vanity numbers is only half the solution; the other half is protecting and preserving the public recognition of the 800 code as a public commercial domain. ICB urges the Commission to address both matters on reconsideration.

Respectfully submitted,

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Date: June 5, 1998

## CERTIFICATE OF SERVICE

I hereby certify that on this, the 8th day of June, 1998, copies of the foregoing pleading have been served by first class mail, postage prepaid, on the following:

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A handwritten signature in black ink, reading "Robert J. Keller", is written over a horizontal line.

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